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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 968 and 969

RALPH E. WHITE,

vs.

Petitioner,

THE PEOPLE OF THE STATE OF ILLINOIS, *Ex Rel.*
LYMAN F. MARTIN, CECIL GRGURICH, JOSEPH
CERNY, HENRY J. METZ, JOHN F. GAZAREK, AND
FRANK J. KUCERA

**PETITION FOR WRITS OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST DIS-
TRICT.**

*To the Honorable, the Justices of the Supreme Court of
the United States:*

Your petitioner, Ralph E. White, respectfully shows unto
your Honors as follows:

Petitioner is a citizen of the United States, native born,
and a resident of the Village of Lyons, County of Cook
and State of Illinios, and occupied the office of Village Clerk
of said Village at the time here in question.

The judgments here sought to have reviewed were en-
tered by the Appellate Court of Illinois, First District at

Chicago, Illinois, upon appeal from the Superior Court of Cook County, Illinois, which judgments became final in said Appellate Court when the Supreme Court of Illinois, the highest judicial tribunal of that State, denied petitions for leave to appeal thereto from said Appellate Court judgment.

The two judgments of the Superior Court of Cook County, Illinois, here involved in the transcript were consolidated for hearing in the Appellate Court of Illinois. One is a mandamus judgment directing a ticket to be put on an election ballot, and the other a contempt sentence of six months imprisonment for failure of your petitioner to print the ticket on the ballot as ordered.

Summary Statement of Matter Involved

The mandamus proceeding, out of which said contempt proceeding grows, was commenced in the Superior Court of Cook County, Illinois, a court of general jurisdiction, on April 5, 1945, to compel your petitioner, as Village Clerk of the Village of Lyons, to print on the ticket for the annual Village election to be held on April 17, 1945, the names of the Relators in said suit as candidates for office as nominated in certain nominating papers certified by the Regular Peoples Party, and filed in the office of petitioner as Village Clerk. The complaint was answered and the matter proceeded to judgment on April 13, 1945, when the court ordered a mandamus writ to be issued directing the said ticket to be printed on the ballot for the annual election to be held on April 17, 1945. The ticket was not printed on the ballot for reasons hereinafter appearing.

The Superior Court on April 18, 1945, entered a rule on petitioner and one Joseph F. Janda, whom the relators claimed was acting as Village Clerk, to show cause why they should not be punished for contempt for violating said

mandamus order. The rule was discharged as to Janda upon his answer showing that he was not Village Clerk of said Village.

Your petitioner in his answer to said rule urged that the said Superior Court was without jurisdiction in the said mandamus proceeding to compel your petitioner to disobey the provisions of the law and to disregard the duty cast upon him by the Illinois Election Code; that the court had no power or jurisdiction to create a duty contrary to the duty created by the Statute; and that, in performing the duty created by the statute, petitioner was not wilfully and contemptuously disobeying the mandate of the court but was acting in obedience to the order of the law, and his oath of office; also that petitioner contended that prior to said judgment, arrangements for said election had been made as required by the law, and that it was impossible to undo, and do over, that which had been done and that the mandate was impossible of performance.

Petitioner further answered that his office as Village Clerk was a part of the executive department of the constitutional government of the State, with duties fixed by law, and was duly performing his duty, and, while in the due and lawful exercise of his legal duties, he was not subject to the direction of, nor under control of the judicial department; that the Illinois Constitution (Article III), provides that the powers of its government is divided into three distinct departments, Legislative, Executive and Judicial, and provides that:

“No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except as hereinafter expressly permitted.”

And petitioner shows that the exceptions contemplated have no bearing here.

Petitioner further answered to said rule that the Municipal Electoral Board was a body created by the Illinois Election Code with jurisdiction to hear objections to nominating petitions and to decide whether valid, or whether objections thereto should be sustained, and states that a decision of the board on that issue is final; that the Municipal Electoral Board met, heard the objections to the said nomination papers, and sustained the objections thereto, and reported its decision to the Village Clerk, and that its decision was final and RES ADJUDICATE; and that it was the duty of petitioner to obey the mandate of the statute to "abide by and comply with the ruling so made to all intents and purposes", as the law provides; that the judgment in mandamus so entered was null and void as a judicial interference with the executive branch of the government, in that, it was a judicial review of and overruling of the rulings and findings of said Municipal Electoral Board, a body of equal dignity with said Superior Court, the judgments of which were binding on all courts and not reviewable in an action of mandamus.

Without reference to the questions of fact raised in the answer of petitioner to said rule, or the questions of jurisdiction presented, the court without striking the answer, or taking evidence on the questions of fact raised, proceeded instanter to render judgment over said answer, and adjudicated petitioner to be in contempt of court, and fixed imprisonment for six months as punishment.

Appeal was taken from the mandamus judgment and from the judgment of contempt to the Appellate Court of Illinois, First District, where the two matters were consolidated for hearing and one transcript of the two records was filed.

The Appellate Court rendered two opinions on the record, affirming each judgment, and the Supreme Court of Illinois

denied leave to appeal from both judgments making each judgment final in the said Appellate Court.

Both records appear in the transcript and this petition seeks to have each judgment reviewed—only one petition, however, being filed herein.

A history of the two cases is now set forth.

The History of the Two Cases

The undisputed facts in the record show that for the annual village election to be held on April 17, 1945, the Regular Peoples Party, an established political party in said Village filed on March 13, 1945, a nominating certificate for a set of candidates, being the relators in said mandamus proceeding, for the April election which stated that the Regular Peoples Party was an established and existing political party in said village and that the ticket had been nominated at a caucus of the party.

The Illinois Election Code provides that if the population of a Village is over 5,000, existing or established political parties must nominate their candidates in an open primary for which the law provides.

Objections were filed to said nominating petition on March 17, 1945, by two registered voters, on the ground that the population of the Village was in excess of 5,000, and that for such reason the said nominating certificate was invalid and void.

The then President of said Village was a candidate for reelection to his office, but petitioner as clerk, and Louis Hoffman, as Senior Trustee, were not candidates to succeed themselves, and were the qualified Village officials designated by law to sit on the Municipal Electoral Board, with the County Judge of said County.

Petitioner, upon receipt of the said objections to said Regular Peoples Party ticket, notified Edmund K. Jarecki,

County Judge of Cook County, of the situation and enclosed the said nominating petition together with the said objections, giving the names of himself and Louis Hoffman, as the other two members of the Municipal Electoral Board with addresses, and requested the County Judge to convene a meeting of the Board to consider said objections (Tr. 50-51).

The Municipal Electoral Board Is in Legal Effect a Court of Limited Jurisdiction

The Municipal Electoral Board is required to pass upon: whether the nominating papers are in form, filed as required by law, are genuine, represent the decision of the caucus or convention, and

“in general to decide whether or not the certificate of nomination or nomination papers on file are valid or whether the objections thereto should be sustained and a decision of a majority of the electoral board shall be final.”

The Municipal Electoral Board is required to report its decision within twenty-four hours after reaching it, with the papers, to the Village Clerk who, the law says:

“shall abide by and comply with the ruling so made to all intents and purposes” (Ill. Rev. Stat. Ch. 46 Sec. 10-10).

On March 19, 1945, Judge Jarecki issued a call giving notice to the candidates, the objectors and members of the Board to meet in his Court room in the County Court House at 10:00 A. M., March 23, 1945, to hear and pass upon the objections.

On March 21, 1945, the several candidates of the Regular Peoples Party filed written objections with Judge Jarecki wherein they specified, as an objection that the Federal

census was controlling and that the Board had no jurisdiction to consider the objections. (Tr. 60)

The Hearing Before the Electoral Board

On March 23, 1945, the Electoral Board convened as noticed, and Judge Jarecki presided. The personnel of the ticket objected to, with their counsel, were presented. Due to a misunderstanding as to the exact time the Board would convene, the objectors and their counsel were not present. The Village officials suggested waiting to hear the objectors, but Judge Jarecki stated that he was "not going to sit here all day for them" (Tr. 65).

The issue was stated to be what evidence of population of the Village was controlling whether Federal census of 1940, or the Municipal records. The Federal census of 1940 showed the Village had a population of 4960.

According to local figures officially established the population of the Village of Lyons was over 5,000; the O. P. A. figures were 6200 (Tr. 66); the registered voters for the year ending March 3, 1945, were 3942, and according to the clerks books and records the last municipal census showed a population in excess of 6200 (Tr. 87).

The section of the statute providing the method of determining the number of inhabitants of a city or Village in such cases was then read to the Electoral Board as follows:

"Whenever in this act any provision thereof is based upon the number of inhabitants, the number of inhabitants of the City or Village shall be determined by reference to the latest census taken by authority of the United States, or of this state, or of such city or village; * * * Any city or village may, by ordinance, provide for the taking of a census of the population thereof, in order to determine the number of such population for any and all purposes of this Act, and the several courts of this state shall take judicial

notice of the population of any city or village, as the same may appear from the latest Federal, State, City or Village census so taken" (Tr. 66-67).

When the Act was read, Judge Jarecki, presiding, said, "If the Federal Census determines that Village to be below 5,000, that governs" (Tr. 65).

Your petitioner then said, "State or Municipality, is the way I read it."

Judge Jarecki then put the issue to a vote and the record was, two votes to sustain the objections, and one, Judge Jarecki, to overrule them.

A motion was then made by counsel for the Regular Peoples Party candidates to continue the hearing for the reason, as said, that he expected to try out the question of the legality of the Board in a pending mandamus proceeding.

The chairman then continued the further hearing to March 27, 1945.

On March 22, 1945, the day prior to said hearing just described, a complaint for a writ of mandamus was filed by the candidates on said Regular Peoples Party ticket in the Circuit Court of Cook County against *County Judge Jarecki only* to compel him to return the said papers to the Village Clerk and abide such other orders as the court should make.

On March 26, 1945, an amendment was filed to said mandamus complaint alleging that your petitioner was not the Village Clerk of said Village, and that the proceedings of the said Board were accordingly void. Petitioner was not given notice of said suit.

On March 26, 1945, said Edmund K. Jarecki, County Judge, appeared in said suit by the State's Attorney of Cook County and moved *ore tenus* to dismiss, and said

Jarecki not pleading further, the court as by default entered an order *personally directing* Judge Jarecki to enter an order in the Municipal Election Board proceedings that the Board was not properly and lawfully convened and that it should be dissolved and to dissolve the same; and that he forthwith return all papers and documents in said Electoral Board proceedings to the proper municipal authorities (Tr. 78-80.)

No persons were made parties to said proceedings other than said Jarecki; and in said judgment, the said Circuit court found and adjudicated, without your petitioner being before said court, or being made a party to said cause, that your petitioner "was not in truth and in fact Clerk of the Village of Lyons at the time of the convening and hearing of said Electoral Board, and therefore had no power or authority to act as a member of said Electoral Board," thus, in a mandamus proceeding, adjudicating petitioner's title to said office without petitioner being before the court. (Tr. 79.)

Said Jarecki thereupon, on March 26, 1945, responding to said judgment, mailed all of the papers pertaining to said hearing before said Municipal Electoral Board to your petitioner as Village Clerk of said Village.

On March 27, 1945, your petitioner and said Hoffman, with their counsel, and said objectors with their counsel, and said candidates named on said Regular Peoples Party ticket met in his chambers with said Jarecki, and his counsel, pursuant to the adjournment of said Electoral Board on March 23. That thereupon said Jarecki announced that he had, pursuant to the said order, mailed all papers in said proceeding to your petitioner, that he regarded said Board as illegal, and refused to take any further part in the proceedings and deliberations of said Board. (Tr. 74-78.)

Counsel for your petitioner and said Hoffman, being the Village Attorney for said Village of Lyons, then enquired of Judge Jarecki:

"Is your Honor, based upon this order, refusing to act as Chairman?"

To which Judge Jarecki replied:

"Certainly. * * * I am just following his instructions, and the Board is dissolved, and that settles it."

To which counsel for your petitioner and said Hoffman stated:

"I don't believe you have the power to dissolve this Board. I think the Board has acted. The board is here today to make a finding."

Counsel asked Judge Jarecki if his court room was available to conclude the proceedings to which he replied in the negative, and counsel for your petitioner and said Hoffman then stated:

"Let the record show we will go and meet some place else."

Your petitioner and said Hoffman and their counsel, and the said objectors and their counsel then proceeded to the Clerks office of said court and recorded the action of said Board which had been taken upon said objections on March 23, 1945, sustaining said objections to said Regular Peoples Party ticket and certified said action to the Village Clerk of said Village as the action of the Municipal Electoral Board as organized.

That on March 27, 1945, the certificate of the Municipal Electoral Board was filed in the office of the Village Clerk of said Village of Lyons as required by the statute, and thereupon it became the bounden duty of your petitioner to "abide by and comply with the ruling so made to all

intents and purposes," as directed by the law governing the duties of your petitioner.

The members of said Regular Peoples Party ticket then sought to have your petitioner and said Hoffman adjudicated in contempt of court for completing the proceedings of said board contrary to the order entered upon Judge Jarecki to dissolve said Board.

Your petitioner and said Hoffman appeared to said motion and defended and pointed out that the Municipal Electoral Board was a statutory creation with a designated purpose, and that the refusal of one of its members, who was designated by statute as chairman, to further act after the board was organized and functioning and had acted upon the issue would not prevent the other two majority members from completing its statutory duties and that the action of the court in adjudicating your petitioner not to be Village Clerk was an action taken without due process of law under the Federal and State constitutions.

The Circuit Court refused to adjudge your petitioner and said Hoffman to be in contempt for the reason that your petitioner and said Hoffman were not parties to said Circuit Court mandamus proceeding.

On April 5, 1945, Lyman F. Martin, Cecil Grgurich, Joseph Cerny, Henry J. Metz, John F. Gazarek and Frank J. Kucera, who were the several candidates named in the nominating petition of the Regular Peoples Party, filed their complaint in mandamus in the Superior Court of Cook County against your petitioner and Joseph F. Janda, setting up therein that they had filed the said Regular Peoples Party ticket in the office of the Village Clerk of said Village of Lyons; that their nominating papers were sent to said Edmund K. Jarecki with the objections thereto; that relators had filed said other mandamus proceeding in the Circuit Court of Cook County, had procured the order directing said Jarecki to dissolve said board, a copy of which they attached to said

petition as Exhibit B; (abst. 12-14); that said Jarecki, pursuant to said order, had dissolved the board and returned the papers to your petitioner; that they had demanded of defendants that they place the said ticket upon the ballot for the forthcoming election; that because they could not say with certainty whether your petitioner or Joseph F. Janda was Village Clerk they made each of them parties defendant, and prayed that the court determine who was clerk and cause the said ticket to be placed upon the official ballots to be used in the Village election to be held on April 17, 1945.

Your petitioner and said Joseph F. Janda appeared and moved to strike the said complaint and dismiss said petition alleging as grounds that the order of the Circuit Court did not vest Edmund K. Jarecki with power to dissolve said Municipal Electoral Board; that said Municipal Electoral Board is established by law, was at said time legally established and lawfully constituted, and its rulings and findings valid; that the court had no power to try the title to the office of Village Clerk; that the judgment order of the Circuit Court directing Judge Jarecki to return the papers and dissolve the said Electoral Board was void for want of jurisdiction over the Electoral Board. The court overruled the said motion and the defendants answered instanter.

Your petitioner and said Janda in their answer to said petition set out the history of all prior proceedings with a copy of the nominating papers, the objections thereto, the notice to Judge Jarecki, the call of the Municipal Electoral Board to meet, a transcript of the proceedings of the said Board had on March 23, 1945, and those of March 27, 1945; the further record made by your petitioner and said Hoffman after Judge Jarecki refused to further participate; the proceedings in the Circuit Court mandamus proceeding and the entire written record down to the date of said answer (Tr. 22-113).

Your petitioner contended in said answer that the Circuit Court had no jurisdiction over said Municipal Electoral Board, and that its judgment requiring Judge Jarecki to dissolve said Board was wholly void and of no effect; that the action of the two members of the Board, being a majority thereof, in completing the proceedings of the Board and reporting the same to the Village Clerk of the Village was legal and valid and in accordance with their statutory duty.

Your petitioner answered further that no duty rested upon him to place said ticket on the ballot; that the action of said Municipal Electoral Board was *res adjudicata* and binding, the statute making its action final.

No Reply and No Evidence

No reply was filed by said relators to the answer of your petitioner so filed.

No evidence was heard by the court, the judgment of said court was rested upon the pleadings. The judgment order recites evidence heard but the report of proceedings shows that none was heard.

The Mandamus Judgment

The judgment orders that a writ of mandamus issue directing your petitioner as clerk of said Village and said Janda, insofar as he was acting as Village Clerk, to print, or cause to be printed, the Regular Peoples Party candidates on the official ballot for said election, and to cancel and destroy all ballots already printed, and to recognize said nominating papers as if no objections had ever been filed against them.

Contempt Proceeding

Petition for Rule to Show Cause

On April 18, 1945, the relators filed a petition in said cause for a rule on your petitioner and said Janda to show cause why they should not be adjudged in contempt of court. The petition is based upon the record and shows that neither petitioner nor Janda complied with the mandamus order.

Answer to the Rule

Your petitioner in response to said rule to show cause again pleaded the prior proceedings in the cause and the facts as above set forth. Petitioner alleged that he was at all times in question the duly elected Village Clerk, and that he did not wilfully act in contempt of the court, but that he only performed his duties as required by law.

Defense of Lack of Jurisdiction Pleaded

Petitioner claimed the Superior Court was acting without jurisdiction and set out the following:

Respondent says that Article III of the Constitution of the State of Illinois provides as follows:

Distribution of Powers

Departments of Government

“The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”

And this respondent shows that as Village Clerk of the Village of Lyons he is an officer of the executive depart-

ment of the Constitutional government of the State and as such while in the due exercise of his legal duties he is not amendable to the control or direction of the judicial department of the government, and that the jurisdiction of the courts of Illinois does not extend to modify, change or excuse the statutory duties of municipal officials, nor have the courts of this State any power or jurisdiction to compel a municipal officer of the executive department to take or do an illegal act or an act in violation of his sworn duty or his official oath.

This respondent answering said rule further says: That mandamus had no jurisdiction to create new duties nor enforce illegal acts but only to enforce the performance of legal duties where the performance of legal duties is refused.

This respondent answering said rule further says that when the said Lyons Municipal Electoral Board filed its ruling and decision upon said objections to the said "Regular Peoples Party" certificate of nominations or nomination papers with the Village Clerk, it became the duty of this respondent to prepare the official ballots for said election in accordance with the ticket legally filed, and furnish them for the judges of election of said village pursuant to the statute, and this was the duty under the law imposed upon this respondent.

This respondent answering said rule further alleges that this court was advised by the pleadings on file herein, which fact stood admitted, that the objections to the said certificates of nomination or nomination papers of the "Regular Peoples Party" had been sustained by the final action of the said Lyons Municipal Electoral Board and that pursuant to the decision of said Electoral Board no such "Regular Peoples Party" existed for purposes of said election.

Answering said rule further this respondent alleges that no legal duty rested upon him as Village Clerk to print a ballot for said election with the names of the candidates of

the said "Regular Peoples Party" ticket and that this court had no jurisdiction to enter any mandamus order whereby to require this respondent to violate the election laws in such case made and provided and to do an act illegal and in violation of law.

Notwithstanding that no mandamus order, mandamus judgment or preemptory writ of mandamus issued in pursuance to said order was ever served upon this respondent and further answering said rule says:

That in entering said mandamus order the court invaded the jurisdiction of the executive department of the government and the order directing the issuance of said writ to destroy ballots already printed and to print new ballots with "Regular Peoples Party" ticket thereon is void and of no force or effect.

Wherefore, this respondent, by reason of the above and foregoing answers prays this honorable court for an order dismissing the rule herein described.

The Viewpoint of the Appellate Court

The Illinois Appellate Court refused to pass upon the question urged by your petitioner, that the Superior Court had exceeded its jurisdiction by invading another department of government by giving to your petitioner orders alleged to be in direct conflict with duties fixed by the Legislature in his office as Village Clerk. The expressed excuse of the said Appellate Court for refusing to consider said jurisdictional question was stated to be that the Supreme Court of the State of Illinois, had "exclusive jurisdiction to pass upon constitutional questions" (Tr. 244), and therefore the jurisdictional point was not being considered.

It is pointed out, however, that the point made, that the Superior court had exceeded its jurisdiction, was in no sense

a "constitutional question," within the meaning of the Civil Practice Act of Illinois which regulates appeals. The question of jurisdiction, as this court knows, can be raised in any court, at any stage of litigation, before its judgment passes into finality, no matter on what ground jurisdiction is questioned.

No Construction of the Illinois Constitution Was Involved

The provision of the Illinois Civil Practice Act governing appeals provides that appeals in which "the validity of a statute or a *construction of the constitution* is involved," shall be taken directly to the Supreme Court. (Ch. 110, Sec. 75, Ill. Rev. Stat.)

Asking the Appellate Court to *apply* the provisions of the constitution to the facts in the record is not in any sense asking for a "construction of the constitution." The provisions of the constitution are clearly and tersely expressed and need no construction. It says:

"No person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others * * *."

Your petitioner contends that a constitution as commonly understood is fundamental law, and that the *disobedience of its plain provisions* by the court does not raise a question of the *construction of its provisions*, but raises only a question of its *applicability* or violation which every court must determine for itself as it does the application of any governing law, or legislative act.

Refusal to Adjudicate a Controlling Question Denies Due Process

The denial by the Supreme Court of leave to appeal from the Appellate Court leaves that question of jurisdiction yet undecided, and open for decision, and presents here a record

so far devoid of judicial action as to constitute a denial of due process of law.

The Appellate Court, holding that the trial court had jurisdiction to review the decision of the Municipal Electoral Board, concluded that the Superior Court had power to enter its judgment in mandamus and to punish its disobedience by contempt process, and affirmed the judgments appealed from.

The jurisdictional question was controlling and had it been considered the sentence must have been reversed.

Questions Presented

I

Is petitioner deprived of due process of law where the Appellate Court has refused to consider a controlling jurisdictional question arising under the state constitution, and the Supreme Court has denied an appeal to that court, leaving that controlling question undecided?

II

Where it appears that the Superior Court was without jurisdiction to order a writ of mandamus to compel petitioner to do the acts directed, and that the Appellate Court refused to consider such jurisdictional question, is petitioner deprived of that due process of law guaranteed by the Federal Constitution?

Jurisdiction of the Court to Review Said Judgment

The Supreme Court of Illinois is the highest judicial tribunal of that State, and by its denial of a petition for leave to appeal said judgment to that court, the judgment of the Appellate Court of Illinois became final and the writ of certiorari of this court to bring up the record for review, if allowed, issues direct to said Appellate Court of Illinois,

First District, Chicago, Illinois, (*Chesapeake & O. R. Co. v. Mikas*, 280 U. S. 102, reversing 249 Ill. App. 446; *Minneapolis K. & Co. v. Rock*, 279 U. S. 410, reversing 247 Ill. App. 600; *Davis v. Aetna Acceptance Co.*, 293 U. S. 328, reversing 273 Ill. App. 628).

The refusal of the Appellate Court of Illinois to consider the question of jurisdiction of the court to imprison petitioner, is a violation of petitioners right to due process of law as guaranteed by the Fourteenth Amendment, and presents a Federal question which this court may review by Certiorari, by virtue of Section 237 B of the Judicial Code (28 U. S. C. A. Sec. 344).

The refusal of the Appellate Court to consider the contention of petitioner that the Superior Court had no power under the Illinois Constitution to direct petitioner to perform acts in violation of duties established by the legislature and to imprison petitioner for contempt of court for performing his legislative duty instead of that fixed by the court, where it is obvious to the court that the point was well taken, is a deprival of due process of law to petitioner as guaranteed by the Federal Constitution.

Reasons for Allowance of the Writ

I

Petitioner at the time in question was a public official charged by law with the performance of certain statutory duties, and the orderly processes of government required that those duties be carried out as provided in the law; and petitioner should not be penalized by imprisonment for obeying the law.

II

Where it appears that the Superior Court exceeded its constitutional jurisdiction in directing official acts to be performed by petitioner contrary to law, and its inflicted

punishment is in fact for *obedience to law* rather than disobedience to order of the court; and where the Appellate Court of Illinois has refused to consider the question of jurisdiction of the court to inflict such punishment, this court should award to petitioner that due process of the law guaranteed by the Federal Constitution.

III

Petitioner was at the time in question a public official and had to perform an unpopular act, and the courts of the United States should give him due process of law where the local courts do not.

IV

The matter here involved is not purely local but one involving public duties and this court should award the writ to protect a public official from imprisonment for adhering to his lawful duties as against the usurpation of authority of a judicial tribunal.

The Opinion Below

The opinions of the Appellate Court, First District, are not yet published. They appear at pages 239 to 248 and at page 267 of the Transcript.

Jurisdiction

The jurisdiction of this court is invoked under Section 237 (b) of the judicial code; 43 Stat. 927; 28 U. S. C. A. Sec. 344 (b).

Date of Final Order

The date of the final order of the Supreme Court of Illinois, denying leave to appeal, is September 11, 1946. (Tr. 272).

On December 4, 1946, Mr. Justice Douglas entered an order extending the time within which to file this petition

to January 11, 1947, and on January 8, 1947, by order entered by Mr. Justice Murphy, the time was further extended to January 31, 1947.

Errors Relied Upon

The Superior Court of Cook County erred in entering its judgment of April 13, 1945, awarding the writ of mandamus to compel petitioner to take the steps therein ordered.

The Superior Court erred in entering said order of June 1, 1945, adjudicating petitioner to be in contempt of court and sentencing him to imprisonment.

The Appellate Court of Illinois, First District erred in affirming the said two judgments of the Superior Court of Cook County.

Prayer

WHEREFORE, petitioner prays that this court allow this petition for certiorari and grant the writ of certiorari directed to the Appellate Court of Illinois to bring up the consolidated records in these two causes here to review the said judgments of the Appellate Court of Illinois for the First District thereof.

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Chicago, Ill.

ODE L. RANKIN,
134 N. LaSalle St.,
Chicago, Ill.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinions below have not yet been reported in the Illinois Appellate Court Reports. They will be found at pages 239 and 267 of the printed transcript of the record.

Jurisdiction

The jurisdiction of this court is invoked under Sections 237 (b) of the Judicial Code; 43 Stat. 927; 28 U. S. C. A. Sec. 344(b).

The date of the final order was September 11, 1946 (Abst. 272) on which date the Supreme Court of Illinois denied leave to appeal.

On December 4, 1946, Mr. Justice Douglas entered an order extending the time to January 11, 1947, within which to file the petition for certiorari; and on January 8, 1947, by order entered by Mr. Justice Murphy the time was further extended to January 31, 1947.

Where an order is entered without jurisdiction, or where it is beyond the scope of the remedy, it is not a contempt of court to disobey it.

Ex parte Rowland, 104 U. S. 604;

People v. Kowalsky, 307 Ill. 378, 382.

A constitutional question is not involved so as to give the Supreme Court of Illinois jurisdiction on direct appeal where the judgment is attacked on the ground that its enforcement will deprive the defendant of due process of law.

Baumgartner v. Boyer, 384 Ill. 584, 588.

Due process of law requires a court having power to hear and determine the case.

Baumgartner v. Boyer, 384 Ill. 584, 588.

Where the legislature has created a special forum to try political rights and provides that its judgments shall have finality, courts are excluded from reviewing its actions, or ignoring its pronouncements.

People ex rel Murray v. Rose, 211 Ill. 249, 251.

ARGUMENT

I

The Fourteenth Amendment guarantees to citizens of the United States due process of law—of the law of the land—of the state in which the proceeding originates—against imprisonment without the hearing of a jurisdictional question upon which the right to imprison depends.

The petitioner here is entitled to due process of the law of the land, i.e., of the State of Illinois, being the State in which petitioner was condemned to imprisonment. Accordingly, the law of Illinois is here stated as it applies to petitioners case.

The Constitution of Illinois has the usual basic provision of our country, separating the three elements of government, legislative, executive and judicial, and prohibiting the overlapping exercise and use by anyone of those departments, of the powers belonging to either of the others.

The language of Article III of the Illinois 1870 Constitution is as follows:

“Article III, Distribution of Power. The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as herein-after expressly directed or permitted.”

It is petitioner's contention that the provision of the Election Code of Illinois (ch. 46 Art. 10 Sec. 9-10) providing for a municipal officers electoral board with jurisdiction to decide with finality upon objections to nominating petitions after notice and hearing, creates a *quasi-judicial* body, the jurisdiction of which is exclusive, and that the Superior Court of Cook County had no constitutional power to step out of its field of endeavor and overrule or ignore the decision of the Municipal Electoral Board, and that its action in so doing was beyond its jurisdiction and void, both in its mandamus judgment and in its sentence of contempt.

DUE PROCESS OF LAW HAS NO FIXED DEFINITION

It is said in the text books that this Court has never attempted to define with precision the phrase, "due process of law" because no definition that could be devised that would cover every permissible exercise of power affecting individual rights, and exclude all forbidden actions; and that the phrase probably never will be defined for reasons inherent in the nature of the guarantee as against the possible abuse of the infinite variety of powers of government (6 R. C. L. 433; 16 C. J. S. 1140).

This case presents an encroachment of a court upon the legislative field, changing the fixed statutory duties of petitioner, as a public officer, putting him between two fires—where he would violate his oath of office, and his duty, if he should disobey the law created to regulate elections, on the one hand; and would subject himself to a contempt proceeding, on the other, if he should disobey the courts mandate.

Petitioner pleaded that his duty was fixed by the statute; that the action of the municipal officers electoral board was made final by the statute; that the jurisdiction of the

municipal electoral board was exclusive; that it stood admitted upon the record that the municipal electoral board had functioned, and by a final order had sustained the objections to the Regular Peoples Party ticket, which imposed a positive duty on petitioner under the statute; that the court had no jurisdiction to overturn the action of the municipal electoral board as being an excursion into the legislative and executive fields of government in violation of the constitution; that it was impossible to have performed the order within the four days time remaining within which to print and distribute the ballots. Yet without a reply from relators, or inquiry by the court, and without pausing to consider the matters pleaded, the Superior Court entered its original order instanter, granting the writ; and likewise, later, entered its contempt order, by which petitioner was ordered to prison for six months for performing that which was his sworn duty to perform.

Courts, of course, have the right to err within their jurisdiction; but, it is not what the profession understands to be due process of law, when a court, operating within the narrow channel of the remedy of mandamus, orders a public official to disobey the commands of the legislature in a purely political matter, where the jurisdiction of the court is positively excluded by the creation of the electoral board, vested with a finality of decision, and jurisdiction to decide.

THE JUDGMENT ORDER ENTERED BY THE SUPERIOR COURT IS
VOID, NOT ERRONEOUS, AND NO CONTEMPT COULD BE PREDI-
CATED UPON IT

Applying what must be obvious, to this case, we have an example of the court ignoring the proceedings of a Municipal Electoral Board, the decision of which the statute made final, and with which statute says the Village Clerk "must

abide by and comply" (Sec. 10-10 Chap. 46, Election Code), and ordering the said Clerk to do an act contrary to the decision of said Electoral Board, and contrary to the provisions of the statute. The judgment order of the court is not merely erroneous, but wholly void, and it is void for the further reason that the act of the court is an excursion into the executive or administrative field of government.

The point is well illustrated by the case of *Ex Parte Rowland, et al.*, 104 U. S. 604, which was an original habeas corpus in this Court to relieve from imprisonment for contempt for violation of a mandamus writ. Rowland and others were County Commissioners of an Alabama County who had been ordered by the United States Circuit Court to levy a special tax under Alabama law with which to pay a judgment against the County rendered upon coupons from railroad bonds issued by the County. The United States Circuit Court issued a mandamus writ against Rowland and others to "levy and assess said tax and cause the same to be collected." The tax was accordingly levied, but the tax collector took the position that his bond was to collect general taxes and not special taxes. The Commissioners reported the matter to the Governor, as the law required and did nothing further to "cause the same tax to be collected." Later, upon the rule to show cause, they were imprisoned for contempt for failure to comply with the mandamus order.

This Court there held that while the law vested the Commissioners with power to do all acts necessary to carry out the law, they were not required to collect the tax, and that the order upon the Commissioners to cause the tax to be collected was beyond the power of the court in mandamus to direct; that it was the creation of a duty which was beyond the scope of the remedy and void, and as the mandamus order was in that respect void, the imprisonment order

likewise was void, and the petitioners were released and discharged.

Also in *Windsor v. McVergh*, 93 U. S. 274, it was held that disobedience to a mandamus writ is excused when there is no legal authority to do the act ordered.

And in *Ex Parte, Nielson*, 131 U. S. 176, it was held where a court passed a sentence beyond the scope of the indictment it was void, and the defendant would be discharged on habeas corpus.

MANDAMUS CAN ONLY ENFORCE AN OFFICIAL DUTY—NOT
CREATE ONE

These cases illustrate that mandamus is a remedy limited in jurisdiction to the enforcing of an official duty, and goes no further. The court may not enlarge its function, nor create a new duty, nor step out of character and employ the remedy in the prohibited field.

The language of this Court in the *Ex Parte Rowland* opinion is appropriate here. We quote (p. 612):

“If the command of the peremptory writ of mandamus was in all respects such as the Circuit Court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. (*Ex Parte Lange*, 18 Wall. 163; *Ex Parte Parks*, 93 U. S. 18; *Ex Parte Siebold*, 100 U. S. 371; *Ex Parte Virginia*, id. 339.)

“It is also settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.”

That is the rule announced in the text books (38 C. J. 937, Sec. 727; p. 938, Sec. 730).

Clearly, under the logic of the authorities, the Superior court of Cook County went beyond the scope and jurisdictional limits of the remedy of mandamus when it ordered petitioner to place on the election ballot a ticket to which the municipal electoral board had sustained objections—thus creating a duty and requiring petitioner to disobey the command of a statute.

And, clearly, by assuming jurisdiction to ignore, or overrule the action of the Municipal electoral board sustaining the objections to the ticket of the Regular Peoples Party, the Superior Court usurped a jurisdiction withheld by the legislature and invaded the field of the other departments of the government in violation of the basic law of the land of Illinois.

As the jurisdiction was paramount and controlling the Appellate Court of Illinois erred in refusing to pass upon the jurisdictional point. The side issues could not matter.

There is no "constitutional" question involved in the jurisdictional point made here. The constitution is basic law and is binding on all courts when it is plain and unambiguous. It requires no construction of the constitutional prohibition that each branch of government must do its own work and function within its own sphere. Nothing is clearer.

In fact the Supreme Court of Illinois, as do all courts of last resort, refuses to further entertain constitutional questions on direct appeal once the point has been definitely decided. Its decision attaches to the constitution and becomes part of it as any law and direct appeals to the Supreme Court no longer lie because of the point.

The reason assigned by the Appellate Court for refusing to pass on the question of jurisdiction, being untenable, it

follows that petitioner has been deprived of due process of law where it must be conceded he has been ordered to prison by a court functioning without jurisdiction; for to imprison without jurisdiction, or power to do so, is to imprison without due process of law.

Why the Supreme Court of Illinois denied leave to appeal is not shown of record. But, as its reason is not of record, its action does not govern here. The action of the Illinois Supreme Court is not an affirmance and gives no jurisdiction to the Superior Court where it had none to exercise in the first instance.

This Court should exercise its discretion to grant the writ to correct this obvious wrong, otherwise petitioner cries in vain for relief from an imprisonment caused by the refusal to continue the processes of law then in operation—a refusal of the court to consider the question of its power and jurisdiction to condemn petitioner to imprisonment without passing upon his plea for due process of law.

This Court should here decide the question where the courts of Illinois have refused to take jurisdiction to decide it.

II

The Municipal Officers Electoral Board had jurisdiction to hear and determine the issues raised by the objections filed to the ticket of the Regular People's Party, and its judgment was final, and its jurisdiction was exclusive.

The statute (article 10, section 10-9 of Election Code) sets up the "Municipal Officers Election Board to hear and pass upon objections to nominations of candidates for offices to Cities, Villages and incorporated towns", and to be composed of the president, Clerk and Senior Trustee of the Village; the President to preside, but in case the presi-

dent be a candidate for election, the person then County Judge is to act as Chairman.

The provisions of the law creating the municipal electoral board are as follows (Ch. 46 Sec. 10-9, Par. 4, Ill. Rev. Stat.)

4. The municipal officers electoral board to hear and pass upon objections to nominations of candidates for officers of . . . villages . . . shall be composed of the . . . president of the board of trustees of the . . . village . . . and the . . . village . . . clerk, and one member of the . . . board of trustees, that member being designated who has served the greatest number of years as member of the . . . board of trustees, of whom the . . . president of the board of trustees shall be the chairman.

5. In the event that any member of the electoral board is a candidate for the office with relation to which the objectors petition is filed, he shall not act as member of the electoral board in that instance, and his place shall be filled as follows:

d. In the municipal officers electoral board by the County Judge of the County in which the City, Village or incorporated town, or major portion thereof, is situated

The Municipal Officers Electoral Board was convened in Judge Jarecki's court room on March 23 at 10:00 o'clock A. M. The objectors arrived at 10:20, having been advised that the hearing would be commenced at 10:30, (Abst. 75) and found the meeting had been held and adjourned.

The statute was read at the hearing, and Judge Jarecki ruled that the Federal census, and that only, was controlling as to population; White thought the State and Village census would control under the statute. Judge Jarecki put the .

whole matter to a vote, and petitioner and Hoffman voted to sustain the objections, and Judge Jarecki voted to overrule the objections (Abst. 65-67).

The statute Ch. 24 Art 1, Sec. 1-9, governing the method of determining population where required by statute, was read by Judge Jarecki. It is as follows:

“Whenever in this Act any provision thereof is based upon the number of inhabitants, the number of inhabitants of the city or village shall be determined by reference to the latest census taken by authority of the United States or of this state, or of such city or village; and it shall be the duty of the Secretary of State, upon the publication of any State or United States census, to certify to each city or village the number of inhabitants, as shown by such census. Any city or village may, by ordinance, provide for the taking of a census of the population thereof, in order to determine the number of such population for any and all purposes of this Act. And the several courts in this state shall take judicial notice of the population of any city or village, as the same may appear from the latest Federal, State, City or Village census so taken.”

THERE WAS A VILLAGE CENSUS

Clearly the Electoral Board had jurisdiction to hear evidence upon what the population was by Village census, regardless of what the Federal census might show. There were then affidavits of proofs before the board as to the Village census, but the suggestions made by petitioner that the state or village census might govern, the way he read it, was brushed aside by Judge Jarecki with the statement: “That is technical. This is merely something to deprive a man of an opportunity to run or the public to express its wishes. I am against it” (Abst. 67). It is common knowledge that the taking of census of population was required in villages for public purposes during that era.

The board had jurisdiction to try that issue. While, it was a matter rather simple of proof, yet it appears Judge Jarecki voted according to the statement of his own Chicago Election Board counsel that the Federal census was 4960 as of 1940, and that that was all they were governed by (Abst. 64); while the other two members voted on evidence before the board as to a Village census. It appears in the proceedings held by the two members after Judge Jarecki abandoned his duties that one of the affidavits that was before the Board when they voted, showed that according to the Clerk's books and records the last Municipal census showed a population in excess of 6200 (Abst. 87).

As proof of that census the board had a right to take cognizance of the figures of the Village census, just the same as Judge Jarecki did of the Federal census and they did so by their vote and by certifying that the population of the Village of Lyons was in excess of 6000 persons.

Having made its findings and closed up its business, the board directed petitioner to make the report and perform the duties of Judge Jarecki, who had refused to further participate, and the board then adjourned *sine die* (Abst. 91). Petitioner made the reports according to the direction of the majority decision of the board as required by statute.

The record therefore shows that there was an issue before the board for its decision; and the board, having decided that issue, its decision was final, and not subject to be reviewed or set aside because some other tribunal might think it erred, or should have reached a different conclusion. Being a court set up in the executive department to expeditiously decide occasional political questions, the judicial department of the state cannot question its decisions collaterally, nor interfere with its deliberations. Courts may only compel the board or its members to do its duties. That was not attempted here. The members of the electoral board were

not made parties. The mandamus proceeding was a collateral attack upon the judgment of the Electoral Board.

Their jurisdiction of the Municipal Electoral Board was first challenged in the Circuit Court mandamus on the ground that the objections filed were on legal grounds only, the contention being there made that only matters of fact could be inquired into by the board; and that the board had no power to find or hold that the population of the village was over 5000. That challenge Judge Fisher ignored in entering his mandamus order on the finding that petitioner was not Village Clerk.

The next challenge to the jurisdiction of the board was in an amendment to the petition in the Circuit Court case filed March 26, 1945, where the relators charged that petitioner was not Village Clerk of the Village of Lyons, and that all his acts were illegal and the board was without jurisdiction (Abst. 68-73). That challenge was acted upon by Judge Fisher who based his order upon that ground, and upon the legal admission by Judge Jarecki (not petitioner), that the allegations were true.

The jurisdiction of the Municipal Election Board was next challenged by the mandamus petition in the Superior Court in which the order appealed from was entered. And that challenge was wholly collateral.

IT IS THE LAW OF ILLINOIS THAT JURISDICTION IN MANDAMUS IS LIMITED TO THE PURPOSES OF THE REMEDY

Here jurisdiction to pass upon objections to party tickets in municipal elections is specifically granted by the legislature to a Municipal Electoral Board for the expeditious handling of controversies where the time element will not permit of the usual law's delays.

There is no doubt that the giving of jurisdiction to the Electoral Board to decide such political disputes is the

withholding of it from the courts and any effort of the courts to make decisions contrary to the statute either directly or collaterally is the usurpation of a power withheld from it, and an invasion of the prerogatives of another department of government. The channel of mandamus is not so broad.

Here it is contended that the court strayed out of its own field of endeavor and gave orders to respondent which only the legislature might delegate, and by its judgment, has established duties inconsistent with those enjoined upon the Village Clerk by the legislature. This we say was beyond the power and jurisdiction of the court to do and that its judgment in mandamus is therefore void, not simply erroneous.

ARTICLE III OF THE CONSTITUTION WAS VIOLATED

Under the Constitution of Illinois, the powers of government are distributed to "three distinct departments—the Legislative, Executive and Judicial", with the express command that no one department shall exercise powers belonging to the other (Art. III). That is the rule of law, fundamental in its nature, that in the last analysis governs the decision of this case. It is not a construction of the Constitution as supposed by the Appellate Court, but is an application of basic law which the Constitution enacts. The Constitution is fundamental law, and is to be obeyed as any law. *Disobedience* of its plain provisions does not raise a question of *construction* of its provisions, within the meaning of the Supreme and Appellate Court jurisdiction.

We suggest that this case furnishes a concrete example of invasion by the Superior Court into prohibited legislative and executive territory.

Here the Legislative department of government created a type of special court, to pass upon political questions

only, called a Municipal Officers Electoral Board, and to be composed of the President, the Village Clerk and the senior trustee, with the president as chairman of the Board (Ch. 46, Sec. 10-9); and vested that tribunal with jurisdiction to hear and pass upon objections to the certificates of nomination of candidates for Village offices (Ch. 46 Sec. 10-9) with the provision that no person who is a candidate shall act as a member of such Board and if the chairman is so disqualified the County Judge shall substitute as chairman (Ch. 46, Sec. 10-9 5d, e).

Here objections were filed to a Village ticket, and the President being a candidate, the Municipal Officers Election Board was the County Judge, in his individual capacity, as Chairman, the Village Clerk, and the Senior Trustee, which personages were Edmund K. Jarecki, Ralph E. White and Louis Hoffman.

THE ELECTORAL BOARD IS A COURT OF LIMITED JURISDICTION

That the Municipal Officers Electoral Board is a political court of limited jurisdiction no one may doubt for the statute has left no doubt, and the Supreme Court of Illinois has so considered it. (*People v. Rose*, 211 Ill. 249).

The Electoral Board is given power to administer oaths, summon and examine witnesses, issue subpoena *duces tecum* for books and records, the same as in equity cases in the Circuit Court; which subpoenas are to be served by the sheriff or constable with statutory fees, to be paid by the asking litigant, the same as provided by law. The enforcement of such subpoena is by contempt in the Circuit or Superior Court.

On the first day of its meeting, the said Board is to adopt rules of procedure for the introduction of evidence, arguments, and in its discretion, briefs of the parties or interested persons. The Board is to pass judgment upon records,

documents, testimony, with the benefit of counsel. It is judicial atmosphere.

The Electoral Board is required to take up the questions raised by the objections and determine whether the certificate of nomination is valid or whether the objections thereto should be sustained and a decision of the majority of the Board shall be final. Within twenty-four hours the Board is required to report its decision with the papers to the Village Clerk who "shall abide by and comply with the ruling so made to all intents and purposes" (Ch. 46, Sec. 10-10, Ill. Rev. Stat.)

THE ELECTORAL BOARD FUNCTIONED AND ADJOURNED

Omitting detail, the Electoral Board convened, considered evidence, decided that the Regular People's Party ticket should not go on the ballot, and reported back its decision to the Village Clerk, whose duty it then became to "abide by and comply with the ruling so made,"—that is, to disregard the Regular People's Party ticket in making up the ballot for the election. It then adjourned *sine die* (Abst. 91).

Limited though its jurisdiction was to a single purpose, that special court's jurisdiction was exclusive and not subject to collateral attack, nor to be ignored, or disregarded, by any other judicial tribunal no matter of what dignity. It functioned within the scheme of the executive branch of government to expeditiously adjudge political rights. That court is always there, although it may function only on political cases, and on rare occasions, when convened, as may be required.

It has the right to be wrong the same as any court, and its judgments, though they may be erroneous, are valid and final. The law says just that.

THE SUPERIOR COURT HAD NO JURISDICTION

As the matter involved political rights arising in the executive part of the government the Superior Court had no jurisdiction to compel the Village Clerk to do a thing the Electoral Board had ordered not done. *The People v. Koerner*, 365 Ill. 521, 523.)

The Superior Court has here ordered a Village Clerk, exercising duties fixed by the Legislative department, and functioning in the executive field, to do and perform duties inconsistent with those fixed by the legislature,—to do and perform which requires him to violate the law, and his duties as fixed by the Legislature.

Such action no court has power to take for the Constitution in Article III thereof, has specifically withdrawn from courts the power so to do by the use of words definitely prohibiting any person, functioning as one department, from exercising power properly belonging to either of the others.

A COURT CANNOT CREATE POLITICAL DUTIES BY MANDAMUS

Here the Legislative and Executive departments functioning through designated agencies had fixed the rights of candidates at the annual Village election; and the judge of the Superior Court, ignoring the action of the other departments, stamped his personality upon the record by directing and ordering a course of action thought by him to be the justice of the situation. That power did not properly belong to the Superior Court. It can create no political duty.

The judgment of the Superior Court in directing the Village Clerk to perform official acts inconsistent with duties charged upon him by the legislative department of government was therefore an invasion of executive and legislative branches of government.

The judgment of the Superior Court is therefore not simply erroneous, and no more,—it is void for all purposes. It is an excursion into the Legislative and Executive fields prohibited to it by the Constitution.

MANDAMUS COMPELS THE PERFORMANCE OF FIXED DUTIES. IT HAS NO JURISDICTION TO REVIEW JUDGMENTS OF AN ELECTORAL BOARD

It has long been recognized that the courts have no right to interfere with the operation of the laws fixing political rights except in equity to protect property, in mandamus to compel the performance of a legal duty where one clearly exists and is challenged by the official; and in *quo warranto* to oust an usurper.

In the case of *People, ex rel. Murray V. Rose*, 211 Ill. 249, the Supreme Court of Illinois had before it a motion for leave to file a mandamus petition against the then Secretary of State, asking that the Supreme Court ignore the action of an Electoral Board, and itself determine who were the legal nominees of the party there in question. The court obviously thought the question one of such importance to litigants and the bar that it filed an opinion with its order denying leave to institute the proceeding in that court, and did it on jurisdictional grounds.

In passing upon the motion the Court said:

“The legislature, by the act named, has created a special forum or court to which such matters are referable, and that body has seen fit to declare by statute that the decision of the body there provided for shall in such matters be final. * * * It is purely a statutory proceeding relative to a purely political question, with which this court interferes on very rare occasions, * * *; the judgment of the proper tribunal has been invoked and has been received, and although it may be contrary to the law, as contended by the relators,

that does not at all interfere with the jurisdiction of the body that tried it, and does not authorize us in a proceeding for mandamus, to review the action of such tribunal, nor will that authorize us to ignore that action and take it as a matter of original jurisdiction here, and, notwithstanding the provisions of the statute making the decision of such tribunal final, determine for ourselves who is entitled to the nomination" (p. 251).

The court there saw its constitutional limitation and denied leave to file the petition. The clear implication from that decision is that the Supreme Court of Illinois believed that the granting of jurisdiction to the Electoral Board to decide the question presented by the objections to the ticket, was exclusive, and a denial of that jurisdiction to all courts of general jurisdiction. In other words the question presented was jurisdictional and the Supreme Court of Illinois obviously decided that it did not have jurisdiction under either statute or constitution to hear it.

It is interesting to note, and instructive to consider, that the Supreme Court had before it at the same time for consideration the case of *People, ex rel., Williams v. Rose*, 211 Ill. 259, where Williams sought a mandamus writ to compel the Secretary of State to recognize the order of an Electoral Board and put his name on the ballot. The court allowed the petition to be filed and held that the action of the Electoral Board was final, that the Secretary of State must obey that decision and awarded the writ.

Still a third case was before the Supreme Court at that same term, *People, ex rel. McKinlay v. Rose*, 211 Ill. 252, where objections to a ticket had been referred to the County Judges under the statute. Being an even number, the Judges were divided in opinion and could not agree, and an application was made to the Supreme Court for leave to file a petition for mandamus to determine the question on which the judges had differed. The petition was

denied because its allegations did not show a clear and legal right or a clear and legal duty so as to vest jurisdiction. The petition failed to show that the political convention nominating the petitioner was called by a legal authority.

Out of those three cases decided at the October 1904 term of the Supreme Court the thought is to be deduced that courts are not vested with jurisdiction to issue an order to a member of the branch of the executive department to compel him to do an act inconsistent with his legal duty or to make a new duty for him to perform, or to act where his duty was not clear, or to control the discretion of political boards functioning in the executive and political field of government.

In *McKinlay v. Rose*, 211 Ill. 252, the petition showed no right in the Supreme Court to review the matter for the reason that when the judges on the electoral board were evenly divided in opinion, the legal effect was that the objections were overruled, as is the rule in courts of appeal.

Mandamus supplies no such remedy, for the Constitution withdraws such power from the courts in cases of the type at bar. The Legislature made no provision for such event, although it could well foresee it. The courts have no power to make law to cure it.

If we apply the doctrine of *People ex rel. Williams v. Rose*, 211 Ill. 259, where the Supreme Court of Illinois ordered the Secretary of State to put Williams on the ballot where the Electoral Board had decided he had a right to be; and also apply the doctrine of *People ex rel. Murray v. Rose*, 211 Ill. 249, when that court refused to take jurisdiction to review the final decision of an election board; and also of *People ex rel. McKinlay v. Rose*, 211 Ill. 252, where the county judges were evenly divided and so overruled the objections in legal effect—then the answer seems clear that where an electoral board has made a decision the

courts will give aid to enforce that decision; and that the court will not ignore such a decision, nor attempt to usurp the functions of such a board and try the merits of the objections.

In *People ex rel. Jos. Sam Perry v. Koerner, County Clerk*, 365 Ill. 521, it appeared that after the Senatorial Committee had certified the name of relator Jos. Sam Perry as a candidate for representative in lieu of one Hennebry, deceased, and after the State Primary certifying Board had certified Perry's name for the ballot, the other Democratic candidate, Romano, filed a mandamus petition in Will County to compel the county clerks of Will and Du Page Counties to disregard the certificate of the State Primary Certifying Board and print only Romano's name on the ballot, and the Will County Circuit Court so ordered; and it was held by this Court that the Circuit Court of Will County was without jurisdiction in ordering the county clerks of Will and Du Page Counties to disregard their statutory duties, and where it appeared that Perry and the State Primary Certifying Board were not made parties. That case is decisive of Judge Fisher's mandamus judgment which was passed upon with no persons before him other than the County Judge; and is also decisive of Judge Graber's mandamus order, in this case, which ignored the board's order and directed the clerk to disregard his statutory duties.

But, more than that, courts cannot collaterally review a political decision. *People ex rel. Jos. Sam Perry v. Koerner*, 365 Ill. 521, is a clear recognition of the doctrine that jurisdiction in courts does not exist under our Constitution to collaterally review the acts of election boards functioning in the political field. It is the duty of the courts to recognize and give effect to such decisions, but not to review or reverse them.

Higgins

As the Superior Court had no jurisdiction to disregard the Electoral Board's decision and issue the mandamus order to put the ticket on the ballot the mandamus judgment was void, and should be reversed.

And the mandamus judgment being void for want of jurisdiction to enter it, the contempt judgment based upon it is void and should be reversed.

As the Appellate Court refused to consider the jurisdictional question petitioner has been and is deprived thereby of due process of law, and the writ of certiorari should be awarded to protect the constitutional guarantee.

Conclusion

The Appellate Court of Illinois by refusing to pass upon the jurisdictional and controlling question presented in this case has deprived petitioner of that due process of law guaranteed to every citizen of the United States, and to protect which the Federal government maintains its judicial system.

It is respectfully suggested that the Court should award the writ and review each of said judgments.

Respectfully submitted,

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